

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 17 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ARATH BLANCO,

Petitioner - Appellant,

v.

MATTHEW CATE, Secretary of the
California Department of Corrections and
Rehabilitation,**

Respondent - Appellee.

No. 06-56756

D.C. No. CV-05-00175-IEG

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Submitted July 15, 2008***
Pasadena, California

Before: SILVERMAN, RAWLINSON, and M. SMITH, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation, is substituted for his predecessor. Fed. R. App. P. 43(c)(2).

*** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appellant Arath Blanco challenges the district court's dismissal of his petition for writ of habeas corpus, arguing that his constitutional rights were violated by (1) the trial court's defective jury instruction as to the robbery-murder special circumstance and (2) trial counsel's failure to object to the defective instruction.

Section 190.2(a)(17)(A) of the California Penal Code provides that "[t]he Penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if . . . [t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit . . . [r]obbery . . ." The jury instruction substituted "a defendant" for "the defendant." Considering the allegedly deficient instruction in the context of all the other instructions and the trial court record—as it must, *see Boyde v. California*, 494 U.S. 370, 378 (1990)—the state court justifiably concluded that the jurors "necessarily [found] that [Blanco] was engaged in robbery at the time that Juan was killed." Thus, there was not a reasonable likelihood that the jury applied the instruction in a manner that violated the Constitution. *See Middleton v. McNeal*, 541 U.S. 433, 437 (2004). Therefore, the

state court's decision was not contrary to or an unreasonable application of federal law as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d).

We decline to address the uncertified issues in this case because Blanco has failed to “make a substantial showing of the denial of a constitutional right.” *Doe v. Woodford*, 508 F.3d 563, 567 (9th Cir. 2007) (citation and internal quotation marks omitted).

AFFIRMED.